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(1)

No. 09-

IN THE

Supreme Court of the United States

JAMES KEENAN and JUDY KEENAN,

Petitioners,

v.

ROSS PYLE, JEFFREY ISAACS and
PROCOPIO, CORY, HARGREAVES & SAVITCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner JAMES KEENAN filed a Chapter 11 bankruptcy petition in 1996 and the case has not yet been closed. The bankruptcy estate has been and continues to be administered by the liquidating trustee, Respondent ROSS PYLE, for more than a decade after payment in full to all creditors.

Petitioners JAMES KEENAN and his non debtor spouse JUDY KEENAN filed an adversary proceeding for damages and declaratory relief in connection with allegedly negligent, grossly negligent, and/or fraudulent conduct in the administration of the case.

The questions presented by this petition are (1) whether a trustee may still be held personally liable for negligence under *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339 (9th Cir. 1983) in light of *Curry v. Castillo (In re Castillo)*, 297 F.3d 940 (9th Cir. 2002), which held that a trustee is entitled to quasi judicial immunity, but left *Cochise* undisturbed; (2) whether Ninth Circuit law now provides that a trustee may be held liable for gross negligence or whether intentional wrongdoing is required; (3) whether a trustee appointed under a plan of liquidation may be held personally liable for breach of the plan, just like any other contract trustee; and (4) whether the trustee in this case is entitled to quasi judicial immunity.

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Petitioners JAMES KEENAN and JUDY KEENAN (Petitioners) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the bankruptcy court in which the adversary proceeding against respondents was dismissed on the grounds of judicial immunity is unreported. The decision of the district court which affirmed the dismissal is unreported. The decision of the Ninth Circuit which also affirmed the dismissal is unreported.

JURISDICTION

The Ninth Circuit's opinion was entered on August 3, 2009. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner JAMES KEENAN filed a voluntary Chapter 11 bankruptcy petition in January 1996. Respondent ROSS PYLE (PYLE or trustee) was appointed as the Chapter 11 trustee, and upon confirmation of the Plan in 1998, acted as the liquidating trustee pursuant to a plan for liquidation and payment to creditors. Respondents JEFFREY ISAACS and PROCOPIO, CORY, HARGREAVES & SAVITCH have at all times acted as PYLE's counsel. Petitioner JUDY KEENAN is the non filing spouse of Petitioner JAMES KEENAN.

In the main bankruptcy case, all creditors had been paid since 1999. The estate is "super-solvent", with assets presently worth an estimated $100,000,000. Although the creditors were paid, with interest, over ten years ago, the trustee has been, and to this day continues to "administer" the bankruptcy estate. Also, besides controlling the personal assets of petitioners, the trustee has taken over control of and administers three separate partnerships in which the petitioners hold partial interests. The estate has paid over $20,000,000 in fees to the respondents and other court appointed professionals since 1999.

Throughout the years, the debtor has sought return of his estate on multiple occasions, however, the trustee opposed all such requests. Although there were no claims pending against respondents, the bankruptcy court agreed with the trustee and held that the debtor has, or may have, "unasserted unreleased claims" against the trustee, et al. and under the plan, these claims must be resolved before the estate can be released. The bankruptcy court described the situation as a "chicken and egg problem".

Since all creditors were paid in 1999 and until the present day, Petitioners undertook various activities such as liquidating assets and then "managing" the residual estate. Finally, in 2006, the Trustee brought a motion and the court issued an order setting a deadline for the filing of any claims against the respondents, any other court appointed professionals, and any and all persons.

Petitioners filed the underlying adversary proceeding within the requisite period. Among other things, the complaint alleged that the trustee and his attorneys had breached the terms of the liquidating plan by failing to return the estate after payment of the creditors. Furthermore, the complaint alleged that respondents took certain actions and obtained court orders therefor by negligently, recklessly and/or fraudulently concealing material information from the trial court.

The bankruptcy court dismissed all claims, without leave to amend, on the grounds of judicial immunity. The district court also affirmed on immunity grounds. The Ninth Circuit, relying on *Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 946-47 (9th Cir. 2002), affirmed and held that the bankruptcy court properly determined that the trustee is entitled to quasi-judicial immunity for the actions alleged in the complaint.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Has Not Directly Dealt With the Issue of a Trustee's Personal Liability for Negligence and/or Gross Negligence

The question of whether a bankruptcy trustee may be held personally liable for negligence and/or gross negligence is unclear under existing Ninth Circuit law.

Through the years, sometimes in reliance on *Mosser v. Darrow*, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951) several circuits have held that a trustee may be liable in

his official capacity for negligence, but is personally liable only for willful and deliberate violations of his fiduciary duty. *See Sherr v. Winkler*, 552 F.2d 1367, 1375 (10th Cir. 1977); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461-462 (6th Cir. 1982); *Lopez-Stubbe v. Rodriguez-Estrada (In re San Juan Hotel Corp.)*, 847 F.2d 931 (1st Cir. 1988); *United States for the Use and Benefit of Julien P. Benjamin Equip. Co. v. Sapp*, 641 F.2d 182, 184-185 (4th Cir. 1981)

However, in 1983 the Ninth Circuit Court of Appeals ruled in *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339 (9th Cir. 1983) that "[a]lthough a trustee is not liable in any manner for mistakes in judgment where discretion is allowed, he is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law." *Id.* at 1357.

In *United States v. Hemmen*, 51 F.3d 883 (9th Cir. 1995), the Internal Revenue Service alleged that the chapter 7 bankruptcy trustee was personally liable for his failure to honor a levy. The trustee argued that he was shielded from personal liability under the doctrine of quasi-judicial immunity. However, the court held that the trustee's failure to honor the levy was not as a result of his duty to protect the assets of the estate, which is his statutory, legal obligation. Citing *Bennett v. Williams*, a case that dealt with the negligent hiring and supervision of a management company, the court noted that "[a]s a general matter, bankruptcy trustees enjoy broad immunity from suit when acting pursuant to court order. . . . Trustees are not immune, however,

for intentional or negligent violation of duties imposed by law." *Id.* at 891 (citing *Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989))

In *Curry v. Castillo (In re Castillo)*, 297 F.3d 940 (9th Cir. 2002), the Ninth Circuit discussed the historical background of the position of bankruptcy trustee, finding that the common law and nineteenth century predecessors to today's bankruptcy trustees were entrusted with both administrative and adjudicative functions. The court stated that "[t]o the extent the trustee performed the functions of a modern-day bankruptcy judge, immunity would have extended to the performance of these common-law adjudicatory functions." Noting that "the trustee is charged with many legal, adjudicative, clerical, financial, administrative, and business functions [,]" the court held that "quasi-judicial immunity attaches to only those functions essential to the authoritative adjudication of private rights to the bankruptcy estate." *Id.* at 950-951.

In its *Castillo* opinion, however, the Ninth Circuit sidestepped *Cochise*. The only mention of the *Cochise* case (other than reporting what the BAP relied on) was the last two sentences of the opinion:

> "We merely hold that the common law, legislative history, and the grant of immunity to bankruptcy trustees and similar judicial officers in analogous cases compel us to conclude that Curry is entitled to quasi-judicial immunity for both scheduling and noticing the confirmation hearing. Because we decide that Curry is entitled to immunity, we

> need not reach Castillo's argument that bankruptcy trustees may be liable for negligence. *See Cochise College Park*, 703 F.2d 1339."

In re Castillo, 297 F.3d at 953.

This holding led the court in *In re Continental Coin Corp.*, 380 B.R. 1 (Bkrtcy.C.D.Cal. 2007), to opine that

> "I must admit that I do not understand the fine distinction made that allows the Ninth Circuit to rule that a trustee is entitled to quasi-judicial immunity for negligence (Castillo) and yet can be subject to personal liability for negligence (Cochise). Obviously if the trustee is entitled to immunity for negligent actions, she is not subject to liability for negligence. . . . But the Ninth Circuit did not vitiate its *Cochise* opinion, so presumably it still has some meaning."

Thus, the *Cochise* and *Castillo* opinions are in conflict. On the one hand, the Ninth Circuit held that a trustee is entitled to quasi-judicial immunity for negligence (Curry), and yet on the other hand, can be subject to personal liability for negligence (Cochise). In light of this apparent conflict, or at a minimum lack of clarity, coupled with the widespread use of reorganization trustees and liquidating trustees, the issue of trustee liability is of significant public importance and thus appropriate for review by this Court.

It is also unclear whether a trustee can be liable for gross negligence as the Ninth Circuit also has not dealt directly with this issue. The only opinion directly addressing this issue is *DiStefano v. Stern (In re J.F.D. Enter., Inc.)*, 223 B.R. 610 (Bankr.D.Mass.1998), in which the bankruptcy court found that imposing personal liability on a trustee only in the case of intentional harm would send the wrong message. The court stated "A trusteeship is 'serious business,' . . . which demands attention. If trustees were liable only for intentional breaches of their duties, the goal of expeditious and efficient administration of bankruptcy estates would be jeopardized. More must be expected of trustees. But how much more?" *Id.* at 627. The bankruptcy court's answer was that gross negligence "strikes the proper balance between the difficulties of the task assumed by trustees and the need to protect the interest of creditors and other parties in the bankruptcy case." *Id.* at 628.

In light of the lack of any Ninth Circuit authority, coupled with the widespread use of reorganization trustees and liquidating trustees, the issue of trustee liability is of significant public importance and thus appropriate for review by this Court.

II. The Ninth Circuit Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or Sanctioned Such a Departure as to Call for an Exercise of this Court's Supervisory Power

This Court's supervisory power should be exercised in this case because the Ninth Circuit has effectively sanctioned egregious conduct by a court appointed trustee and his attorneys, as well as an intolerable situation in which a solvent estate has been held up for over ten years after payment of all creditors because of the unique notion that an estate may not be closed because of "unasserted unreleased claims".

The case began in January 1996, when petitioner James W. Keenan filed a petition for reorganization under Chapter 11 of the Bankruptcy Code and respondent Ross Pyle was appointed as the reorganization trustee, and later, as the liquidating trustee.

The total allowed claims were approximately $3,000,000. To pay those claims, the trustee liquidated assets totaling $26,972,500, with net funds to the estate of $8,436,868. But with directly allocated professional fees and other administrative expenses in the amount of $8,233,827, the net proceeds from the liquidations were $203,041. The balance of the allowed claims, as well as the other professional and administrative costs of now well over $13,000,000, were paid from the rental income of the remaining properties. The ongoing expenses of the estate include attorneys fees and trustee fees that

are usually well over $250,000 per quarter, and which are mostly for providing quarterly reports, routine notices, and filing motions for attorneys fees.

In the underlying complaint, petitioners alleged that respondents conspired to wrongfully seize various assets, that they unnecessarily liquidated certain assets and thus diminished the estate, and then they failed to make payments required by the confirmed plan in order to prolong the case. Also, when petitioners refused to sign a general release of all claims against respondents, they declined to return the estate, on the basis that the estate could not be returned until resolution of all "unasserted and unreleased claims", thus further improperly prolonging the case.

Petitioners also alleged that respondents had been negligent, grossly negligent, or had intentionally concealed vital information and documents from the court when they obtained certain court orders in connection with several very large transactions.

As a specific example, in paragraph 28 of the complaint, petitioners alleged as follows:

> "Defendants also breached their fiduciary duties by failing to foreclose on certain stock purchase notes (in the sum of $195,000 and $317,250 respectively), executed by Michael Ogden and Leonard Guiffre as part of their purchase of a minority interest in Mikal. The notes were subject to a Security Agreement, wherein the shares were given as security for note. Ogden and Giuffre were in default on

those notes, however, Defendants did not foreclose, instead, they offered and paid the purported minority shareholders $570,000 of un-entitled compensation and forgave the Notes. ***In obtaining court approval for this transaction, PYLE failed to present the Security Agreements to the Court and in fact stated under oath that he did not have nor could he locate the Security Agreements even though he had in fact signed a receipt for them and had them in his possession and control. In fact, they were later proven to be in his control.*** The damages resulting from PYLE's breach of fiduciary duty as described herein was in excess of $1,600,000."

The complaint further alleged as follows:

"Defendants also breached their fiduciary duties with respect to the "Pier Block Properties" in Oceanside, CA which consisted of three separate parcels that Plaintiff JAMES KEENAN and his spouse JUDY KEENAN had acquired in 1986. Record title to all three of the parcels was in the name of James and Judy Keenan, but in May 1991, they entered into various Purchase and Sale agreements whereby they agreed to sell a portion of one of the three parcels to Thomas Curtin and Raymond Gomez. They also sold to James Watkins a portion of a separate parcel and retained the third parcel. Pursuant to the Purchase and Sale Agreements, with respect to one of the parcels, Curtin and

Tri-City Opthalmology (Curtin) became the owner of a 34.728% interest; Raymond Gomez held a 2.083% interest; Raymond Gomez Profit Sharing of San Diego County owned a 1.278% interest; and Raymond Gomez Pension Fund of San Diego County owned a 10.326% interest. The Private Trust Agreements, which were executed concurrently with the purchase and sale agreements, provided that Plaintiffs would hold title to these purchasers' respective interest in trust. The Trust Agreements set forth the exact interest of each of the parties as did the purchase agreements. Further the purchase agreements set forth the exact consideration paid for their interests. Despite the fact that Defendants had copies of the Trust Agreements and Purchase Agreements, and thus had clear evidence of the respective parties' interests. ***Defendants falsely denied having these documents*** and claimed that in their absence, there was a dispute and that it would be in the best interest of the estate for him to liquidate this asset by selling "whatever" interest Plaintiffs had for $2,000,000, when in fact the total value of the properties was $23,135,000. and the buyer. ***The Order approving this transaction was approved as a result of the Defendants' intentional or grossly negligent false representations and/or non-disclosures of the true facts to the Court.***"

The complaint also made the following allegations, all of which are in the nature of claims for gross negligence or fraud, or mismanagement.

"Defendants also breached their fiduciary duties by causing the estate to needlessly pay $1,432,654 in taxes by abandoning Mikal's tax status as a Subchapter S corporation."

"Defendants also breached their fiduciary duties with respect to other litigation involving Mikal including the El Pollo Loco matter the La Salsa matter, by negligent handling that litigation, and by charging excessive fees."

"Defendants also breached their fiduciary duties with respect to the 2002 South Coast Highway property sale which resulted in a loss to the estate of $67,386."

"Defendants also breached their fiduciary duties with respect to the Kolodny & Pressman malpractice lawsuit by charging excessive fees and by charging for services not actually rendered."

"Defendants also breached their fiduciary duties with respect to the Fourth Street property located in New Mexico which was sold for less than what was paid for the property."

> "Defendants also breached their fiduciary duties with respect to real and personal property under their custody and control, including but not limited to the estate's real properties as well as with respect to the real

> properties owned by the partnerships in which Plaintiffs had an interest. Among other things, properties were not properly maintained, marketed, leased and were otherwise managed in a grossly negligent and/or fraudulent manner."

"Defendant PYLE also breached his fiduciary duty by purposely depleting the assets of the estate and other assets under his control, by incurring unnecessary fees and costs, and by causing administrative costs to be unnecessarily incurred and paid."

In sum, petitioners contended that respondents were personally liable for failing to promptly administer the estate and pay creditors and for wrongfully refusing to promptly return the residual estate. Petitioners also contended they were personally liable for mismanaging certain estate assets, for the diminution to the estate resulting from their non-disclosure or concealment of documents, and for other negligent, grossly negligent and fraudulent conduct.

First, the Ninth Circuit's ruling of qualified immunity overlooks the fact that the confirmed plan specifically provides that the trustee is liable for gross or willful misconduct, and in particular, "with regard to ascertaining the pertinent facts or in performing any of the rights, powers, or duties under this Plan."

In Section "C" of Article VII of the Plan, entitled "Liability of the Liquidating Trustee," the plan states in pertinent part:

> "The Liquidating Trustee will not be liable for any error or business judgment or for any action taken or omitted to be taken under this Plan, ***unless it is proven that the Liquidating Trustee has been grossly negligent or has acted with willful misconduct in ascertaining the pertinent facts or in performing any of the rights, powers, or duties under this Plan.***"

As noted above, the complaint specifically included allegations that the trustee was grossly negligent or acted with willful misconduct in ascertaining the pertinent facts.

Second, the ruling conflicts with this Court's ruling in *Mosser v. Darrow*, (1951) 341 U.S. 267, which holds that a trustee is not entitled to immunity for intentional and negligent violations of the duties imposed upon him by law, *see Mosser*, 341 U.S. at 272, 274, 71 S.Ct. at 682, 683; *see also Leonard v. Vrooman*, 383 F.2d 556, 561 (9th Cir. 1967), such as failing to ascertain the pertinent facts or failing to make complete and candid disclosures. And, a trustee may also be liable for acts that are not taken in good faith. *Leonard v. Vrooman*, 383 F.2d 556, 561 (9th Cir. 1967), *cert. denied*, 390 U.S. 925, 88 S.Ct. 856, 19 L.Ed.2d 985 (1968).

As noted above, the complaint alleged that the trustee had failed to ascertain the pertinent facts and/or failed to make complete and candid disclosures.

Third, the ruling conflicts with the holding in *In re Holywell Corp.*, 85 B.R. 898, 901 (Bankr. S.D. Fla. 1988), which held that a liquidating trustee is not a trustee under title 11, but rather a contract trustee. . . ."), holding affd, *Holywell Corp. v. Smith*, 503 U.S. 47, 55 (1992); ("[The plan] created a separate and distinct trust holding the property of the estate and gave the trustee control of this property."), but *rev'd on the grounds*, 503 U.S. 47. Thus, as a contract trustee as opposed to a Chapter 11 trustee, Respondent is not entitled to quasi judicial immunity. *See also Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n*, 997 F.2d 581, 592 (9th Cir. 1993) (citation omitted) (holding that a bankruptcy trustee must "manage a business in accordance with state law, as any other person must").

As a contract trustee, it is self evident that he may be held liable for breach of contract where he fails to perform his duties under the terms of the confirmed plan, which are again, among the several specific allegations of the complaint.

It is clear that a trustee is never immune from personal liability for willful and deliberate acts. And in the context of a motion to dismiss, the Court must accept the Debtors' factual allegations as true. *See In re Hemmeter*, 242 F.3d 1186, 1189 (9th Cir. 2001).

The Ninth Circuit decision effectively holds that a trustee ***is*** immune from liability for negligence, gross negligence, breach of fiduciary and even fraud. The ruling also sanctions prolonging a bankruptcy case, indeterminately, based on the notion of pending "unasserted unreleased claims".

These circumstances constitute such a departure from the rule of law as to call for an exercise of this Court's supervisory power. The Ninth Circuit's decision, which effectively sanctions gross misconduct by a court appointed professional, as well as a gross miscarriage of justice must be reversed.

CONCLUSION

For the above, reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 3, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-55780

D.C. No. 07-cv-00451-L-RBB

In the Matter of: JAMES W. KEENAN,

Debtor.

JAMES W. KEENAN; et al.,

Plaintiffs - Appellants,

v.

ROSS M. PYLE; et al.,

Defendants - Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appendix A

Submitted July 29, 2009**

Before WALLACE, LEAVY, and HAWKINS, Circuit Judges.

James W. and Judy L. Keenan appeal from a district court order affirming the bankruptcy court's dismissal of their complaint in an adversary proceeding against the bankruptcy trustee for failure to state a claim upon which relief could be granted because, *inter alia*, the trustee was protected by the doctrine of quasi-judicial immunity. We have jurisdiction pursuant to 28 U.S.C. § 158(d). We review decisions of the bankruptcy court independently without deference to the district court's determinations. *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 857 (9th Cir. 2004). We affirm.

The bankruptcy court properly determined that the trustee is entitled to quasi-judicial immunity for the actions alleged in the complaint. *See Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 946-47 (9th Cir. 2002) (reviewing de novo the bankruptcy court's conclusions of law regarding immunity and stating that a "[t]rustee is immune for actions that are functionally comparable to those of judges, i.e., those functions that involve discretionary judgment"). Because we affirm dismissal on these grounds, we do not reach the arguments on appeal that concern alternative grounds for dismissal. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007).

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

Dismissal with prejudice was proper because quasi-judicial immunity precludes the Keenans' claims. *See Swartz v. KPMG LLP*, 476 F.3d 756, 761 (9th Cir. 2007) (per curiam) (affirming dismissal with prejudice where amendment would be futile because plaintiff's claims would be barred under any internally consistent set of facts).

The bankruptcy court did not abuse its discretion by denying the Keenans' untimely request for a continuance to file their opposition brief because the Keenans failed to show that they diligently attempted to meet the original time for filing and failed to show why they needed 90 additional days to file. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001) ("A district court's decision regarding a continuance is given great deference, and will not be disturbed on appeal absent clear abuse of the court's discretion.") (internal quotation marks and citation omitted).

AFFIRMED.

APPENDIX B — ORDER AFFIRMING JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED MARCH 28, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 07cv451-L(RBB)

Bankruptcy No. 96-00871-B11
Adversary Proc. No. 06-90341-B11

IN RE JAMES KEENAN, d.b.a.
DATA PROPERTY SERVICES,

Debtor.

JAMES W. KEENAN and JUDY M. KEENAN,

Plaintiffs/Appellants,

v.

ROSS M. PYLE; PROCOPIO, CORY, HARGREAVES & SAVITCH, a business entity; JEFFREY ISAACS, an individual; and DOES 1-50, inclusive,

Defendants/Appellees.

ORDER AFFIRMING JUDGMENT OF BANKRUPTCY COURT

Appendix B

In this bankruptcy case pending in the United States Bankruptcy Court for the Southern District of California, Appellants James and Judy Kennan filed a complaint in an adversary proceeding against the bankruptcy trustee and his counsel for RICO violations, breach of fiduciary duty, civil rights violations, declaratory relief, breach of contract, negligence and injunctive relief. Appellees filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (6) or in the alternative for summary judgment pursuant to Rule 56,[1] and an anti-SLAPP[2] motion to strike pendent state law claims. Appellants, represented by counsel, did not oppose the motion to dismiss or in the alternative for summary judgment. They filed an untimely opposition to the anti-SLAPP motion, which the Bankruptcy Court did not consider. It considered the merits of both motions, granted them and entered judgment for Appellees. Appellants, proceeding *pro se*, appeal the judgment.

Appellant/Debtor James Keenan filed a voluntary Chapter 11 bankruptcy case in 1996. Appellee Ross M. Pyle was appointed Chapter 11 Trustee. A joint plan of reorganization was confirmed in 1998 and Mr. Pyle was

1. Rules 12(b)(6) and 56 are made applicable to bankruptcy adversary proceedings pursuant to Rules 7012 and 7056 of Federal Rules of Bankruptcy Procedure.

2. The motion is based on California's anti-Strategic Lawsuits Against Public Participation ("anti-SLAPP") statute, Cal. Code of Civ. Proc. § 425.16. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1100 (9th Cir. 2003).

appointed as the Liquidating Trustee ("Trustee"). At all relevant times, the remaining Appellees were Trustee's counsel approved by the Bankruptcy Court. In the underlying bankruptcy case, the Trustee obtained a series of orders, which resulted in a procedure to close the case. Based on Debtor's objections, the court ordered the Trustee to produce voluminous records and set a deadline for Debtor's filing of any actions or claims against the Trustee and his counsel. Appellants filed the complaint shortly before the deadline.

In their complaint, Appellants alleged the Trustee conspired with his counsel and the Bankruptcy Judge and wrongfully seized various assets, terminated Appellants' compensation, abandoned their residence, mishandled the settlement of a state court judgment and a malpractice claim against Debtor's former counsel, unnecessarily liquidated assets and thus diminished the estate, incurred excessive attorneys' fees and costs, wrongfully deprived them of their ability to hire counsel of their choice, refused to return the estate to Debtor, failed to resign, concealed information from the court related to obtaining court orders, failed to promptly administer the estate and pay creditors, liquidated certain property, mismanaged Mikal, Inc. and other estate assets, sold certain real property, failed to make payments required by the confirmed plan, and breached their fiduciary duty to Appellants.

Appellees maintain that all of Trustee's actions which are the subject of Appellants' complaint were taken pursuant to court approval after full disclosure to the

court and notice to Debtor. Furthermore, in the underlying bankruptcy case, Debtor moved for turnover of the estate and for the Trustee's removal for many of the same reasons alleged in the complaint, which motions were denied. Appellants filed at least three actions against the Trustee and his counsel and appealed numerous Bankruptcy Court decisions to the United States District Court and Court of Appeals. (*See* Notice of Related Cases, filed Mar. 22, 2007 (58 related cases in the United States District Court and Court of Appeals; *see also* Record ("R") at 1955-56 (thirty some appeals).) With the exception of the appeals which are still pending, the pertinent courts found against Appellants. (*See* R at 1961 (appeals affirmed Bankruptcy Court decisions or were dismissed for lack of prosecution).) The resulting decisions cover a large part of Appellants' allegations in the pending adversary proceeding.

Appellees moved to dismiss or in the alternative for summary judgment and to strike pursuant to California's anti-SLAPP statute. In support of their motion to dismiss or in the alternative for summary judgment, Appellees argued, among other things, that the complaint was barred by doctrines of quasi-judicial and derived judicial immunity, res judicata and collateral estoppel, and by the statute of limitations. In support of their motion to strike they argued that Appellants' claims arose from Appellees' protected right to petition in connection with a public issue, and that Appellants could not show probability of prevailing on the merits. They supported their motions with voluminous records of the relevant prior proceedings, including orders

approving Trustee's actions and decisions on appeal affirming Bankruptcy Court orders. (*See* R at 96.)

Appellants did not timely oppose the motions.[3] Instead, they untimely requested a 90-day continuance. (*Id.* at 1615, 1640 (untimely), 1643 (untimely), 1917 (untimely) 2285 (untimely).) The request was based on Bankruptcy Rules 9006(b) and 7056(f) and claimed that the voluminous nature of the motions, the number of legal issues raised and need to conduct discovery mandated a 90-day continuance. (*Id.* at 1615-17, 1639-41, 1956-57, 1962.) Appellees opposed the request. (*Id.* at 1623.) The request was denied because many of the voluminous documents were pleadings and transcripts from earlier bankruptcy proceedings which Appellants already had and had an opportunity to review in the preceding years. (*Id.* at 2280.) In addition, the request lacked any specifics to show why 90 days was needed to prepare an opposition or why the discovery was needed. (*See id.* at 1954, 1956, 1962, 2280.) Without giving proper notice (*see id.* at 2277-78), Appellants filed a motion to reconsider[4] (*id.* at 1639), which Appellees opposed (*id.* at 1677). The motion was denied. (*Id.* at 2277; *see also id.* at 2363-64.) Nevertheless, Appellants

---

3. On the opposition due date, Debtor, proceeding *pro se*, filed an action against the Bankruptcy Judge in the District Court, alleging the case should be transferred to another judge due to bias. (*See* R at 1939, 1955, 2282.)

4. Simultaneously, they filed a motion to disqualify the Bankruptcy Judge. (R at 1651; *see also id.* at 1939, 1954, 2281-82.) The motion was considered and denied by another Bankruptcy Judge. (*Id.* at 1979; *see also id.* at 1970.)

untimely filed an opposition to motion to strike. (*Id.* at 2266.) At no time did they file an opposition to motion to dismiss.

At the hearing, the Bankruptcy Judge considered both motions unopposed. (R at 2353, 2363.) However, his orders granting the motions were not based on the lack of opposition. They were based on findings on the merits. (*See id.* at 2353, 2363-64.)

Appellees' motion to dismiss was granted based in part on the finding that each of Appellants' claims was barred by doctrines of quasi-judicial and derived judicial immunity. (*Id.* at 2357-58.) In addition, the doctrines of res judicata and collateral estoppel barred most of the claims. (*Id.* at 2358-59.) The Bankruptcy Judge also found that the issues that had been previously raised were barred by the statute of limitations; negligence claims against the Trustee were barred by the terms of the plan; the Trustee's counsel did not owe Appellants the same fiduciary duty as the Trustee; and the counsel were not liable for breach of contract because they were not parties to any contract with Appellants. (*Id.* at 2359-60.) Last, Appellants' challenge to Bankruptcy Court's jurisdiction was rejected as patently without merit. (*Id.* at 2360-61). Leave to amend was denied because the immunity doctrines precluded any basis to amend. (*Id.* at 2361.) The motion to strike was granted based on findings that all of Appellants' claims arose out of the bankruptcy proceedings and that the immunity doctrines precluded Appellants from making a *prima facie* case of probability of success on the merits. (*Id.* at 2364-66.)

Appendix B

A Bankruptcy Court's conclusions of law regarding immunity are reviewed *de novo*, while findings of fact are reviewed for clear error. *Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 946 (9th Cir. 2002).

A bankruptcy court's dismissal for failure to state a claim under Rule 12(b)(6) is reviewed *de novo*. *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1189 (9th Cir. 2001). Review is limited to the allegations of the complaint. *Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989). However, matters of public record outside the pleadings, such as the voluminous records of prior proceedings relied upon by Appellees in the Bankruptcy Court, may be considered along with the complaint and consideration of such matters does not convert a motion to dismiss to a motion for summary judgment. *See MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Failure to permit leave to amend is reviewed for abuse of discretion. *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991). An order of dismissal may be affirmed on any ground supported by the record, even if the lower court relied on different grounds or reasoning. *Maldonado v. Harris*, 370 F.3d 945, 949 (9th Cir. 2004).

Orders granting an anti-SLAPP motion to strike is reviewed *de novo*. *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005).

Denial of Appellants' request for a continuance to file their opposition briefs is reviewed for abuse of discretion. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001) ("A district court's decision regarding a

continuance is given great deference, and will not be disturbed on appeal absent clear abuse of the court's discretion.").

On many occasions Appellants do not present clear arguments in their briefs but merely obliquely suggest there may be an argument based on conclusory assertions and without citation to pertinent authority. The court here declines to consider such "arguments."

> We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review. . . . Judges are not like pigs, hunting for truffles buried in briefs.

Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir. 1994) (internal citations, quotation marks and brackets omitted).

The court first turns to Appellants' argument that the Bankruptcy Court abused its discretion in denying their request for a continuance. In denying their request, the Bankruptcy Court reasoned:

> In this Court's view, this adversary proceeding is different from most others because here plaintiffs complain of events which have occurred in the context of

> Mr. Keenan's bankruptcy over approximately ten years, during which time many of the Court's decisions were appealed. The Court recognizes that many of those appeals were abandoned or dismissed, but the conduct was always reviewable. Mr. Keenan has been a party to virtually all the proceedings in the intervening years, received copies of pleadings and orders, appeared for years in his own behalf or on behalf of himself and Mrs. Keenan, and made arguments to the Court. The trustee tried to get Mr. Keenan to review the documents in the trustee's possession. The trustee tried to set up a process for review, then closure of the case, which Mr. Keenan opposed and the Court initially denied in 2001. In 2003 the trustee made a new motion to aid in closure of the case. Debtor opposed, but the Court granted a version of the motion that required the trustee to make available all documents in his actual or constructive possession for examination, and debtor was given a year to complete his review.
>
> Plaintiffs have made no showing of what discovery would be relevant to opposing the defendants' motions, much less why it was not available to them under the Closure Order or through the court file.

(R at 2284-85.) The Bankruptcy Court also incorporated Appellees' argument that no continuance or discovery

was warranted because "many of the documents supporting the moving papers were documents [Appellants] already had and were pleadings and transcripts from earlier proceedings." (*Id.* at 2280, 2285.) The Bankruptcy Court further reasoned that Appellants failed to make "even a minimal showing of why . . . [they] are, and have been, unable to respond to the motions." (*Id.* at 2286).

On appeal, Appellants maintain the denial was in error because "[t]he Respondents spent over 435 hours utilizing six experienced attorneys to file the pleadings which resulted in the dismissal of this lawsuit." (Appellant's Brief at 19.) This argument was not presented to the Bankruptcy Court, and could be rejected solely on this ground. (*See* discussion *infra.*) Furthermore, they do not dispute the accuracy of the factual basis of the Bankruptcy Court's ruling and do not attempt to cure the defects noted by the Bankruptcy Court. The reasons provided by the Bankruptcy Court do not support a finding of abuse of discretion. The Bankruptcy Court's order denying Appellants' request for a continuance is therefore affirmed.

Although they never filed an opposition to Appellees' motion to dismiss, Appellants seek reversal of the Bankruptcy Court order. They raise arguments which they did not present to the Bankruptcy Court.

> Except in the case of jurisdictional questions or where particular circumstances indicate that injustices might otherwise result or

> where public policy re this court declines to consider arguments for reversal that were not presented in the [lower] court.

Ratanasen v. Cal. Dept. of Health Serv., 11 F.3d 1467, 1473 (9th Cir. 1993), quoting *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1206 (9th Cir. 1974); *see also RK Ventures, Inc. v. Seattle*, 307 F.3d 1045, 1061 n. 13 (9th Cir. 2002). This doctrine applies "unless necessary to prevent manifest injustice." *In re Ryther (Ryther v. Lumber Prod., Inc.)*, 799 F.2d 1412, 1414 (9th Cir. 1986), quoting *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 812 (9th Cir. 1982).

Appellants claim they did not file an opposition because their request for a continuance was denied. They claim in this court that they needed a continuance because Appellees spent over 435 hours utilizing six experienced attorneys in preparing their voluminous motions. As discussed above, this reason is not persuasive. Accordingly, no injustice is visited by declining to consider the arguments raised for the first time on appeal.

In the alternative, upon review of the record, this court agrees with the Bankruptcy Court that the quasi-judicial and derived judicial immunities bar all of Appellants' claims.

Quasi-judicial immunity applies "to nonjudicial officers only if they perform official duties that are functionally comparable to those of judges; i.e., duties

that involve the exercise of discretion in resolving disputes." *Castillo*, 297 F.3d at 948. "[T]o determine whether a nonjudicial officer is entitled to absolute quasi-judicial immunity, courts must look to the nature of the function performed and not to the identity of the actor performing it." *Id.* "[I]t is only when the judgment of an official other than a judge involves the exercise of discretionary judgment that judicial immunity may be extended to the nonjudicial officer." *Id.* at 949.

On appeal, Appellants' substantive arguments are primarily directed to the Bankruptcy Court's ruling regarding derived judicial immunity rather than quasi-judicial immunity. (*See* Appellants' Brief at 3-7.) The only arguments applicable to quasi-judicial immunity challenge its applicability to (1) declaratory and injunctive relief; and (2) contract trustees. These arguments are unavailing. "[Q]uasi-judicial immunity available to federal officers is not limited to immunity from damages, but extends to actions for declaratory, injunctive and other equitable relief." *Moore v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996), quoting *Mullis v. Bkrtcy. Ct. for the D. Nev.*, 828 F.2d 1385, 1395 (9th Cir. 1987). A finding of quasi judicial immunity therefore applies to Appellants' claims for declaratory and injunctive relief as well as damages. The contract trustee argument is based on the fact that the Trustee was appointed as Liquidating Trustee by the Bankruptcy Court pursuant to the reorganization plan. (*See* R at 129.) To determine whether quasi-judicial immunity applies, the court does not look to the identity of the actor performing the acts, but the nature of the functions

performed. *Castillo*, 297 F.3d at 948. It is therefore irrelevant how the Trustee was appointed. The Trustee's actions of which Appellants complain were official duties which involved the exercise of discretion in resolving the bankruptcy case. Consequently, quasi-judicial immunity bars all claims against the Trustee.

In addition, bankruptcy trustees and their counsel are entitled to broad derived judicial immunity "when acting within the scope of their authority and pursuant to court order." *Bennett*, 892 F.2d at 823. To qualify for derived judicial immunity, (1) the trustee should obtain court approval and give notice to the debtor of a proposed action; (2) the trustee's disclosure to the court must be candid; and (3) the act must be within the trustee's official duties. *Id.*

On appeal, Appellants do not identify any of Trustee's actions taken without prior court approval and do not maintain that any actions were taken without prior notice to the Debtor. They admit that the Trustee's actions were taken in his capacity as a court-appointed bankruptcy trustee. (*See* R at 3, 11.) They argue that (1) Appellees acted in conspiracy with the Bankruptcy Judge; (2) Bankruptcy Court orders were issued in the absence of jurisdiction and were void; and (3) the Trustee failed to make a candid disclosure to the Bankruptcy Court.

First, Appellants complain that Appellees conspired with the Bankruptcy Judge to consistently rule against Appellants. However, immunity is not lost by allegations

that a judge conspired with a litigant and his counsel to rule against another litigant. *Moore,* 96 F.3d at 1244, citing *Ashelman v. Pope,* 793 F.2d 1072, 1078 (9th Cir. 1986) (*en banc*).

Second, Appellants argue that the Bankruptcy Court lacked subject matter and personal jurisdiction over certain properties and parties, its orders are void because they were obtained by fraud, and all orders issued after March 2002 were void because the Bankruptcy Judge allegedly did not take an oath of office. These arguments are without merit.

As to subject matter jurisdiction,

> The filing of a bankruptcy petition creates a bankruptcy estate, consisting of all of the debtor's legal or equitable interests in property "wherever located and by whomever held." 11 U.S.C. § 541(a). Thus, the district court in which the bankruptcy case is commenced obtains exclusive in rem jurisdiction over all of the property in the estate. The court's exercise of in rem bankruptcy jurisdiction essentially creates a fiction that the property-regardless of actual location-is legally located within the jurisdictional boundaries of the district in which the court sits. Thus, the jurisdiction of the bankruptcy court exceeds that of any other court-appointed receiver. The requirement of uniform application of bankruptcy law

> dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court.

Beck v. Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963, 971 (9th Cir.2005) (some internal quotation marks and citations omitted); *see also* 28 U.S.C. § 157(a) & (b)(1) (referral from district to bankruptcy courts) & (b)(2). This subject matter jurisdiction is exclusive. 28 U.S.C. § 1334(a). Appellants contend that the Trustee took control of certain assets, however, they do not mention that Debtor held an interest in them. Accordingly, Appellants' conclusory assertions that the Bankruptcy Court lacked subject matter jurisdiction (*see* Appellants' Brief at 4, 5, 6, 8, 9-10) is unavailing.

Appellants also assert in a conclusory manner that the Bankruptcy Court lacked personal jurisdiction. (*Id.* at 9-10.) This is baffling because both Appellants are, and at all relevant times were, residents of San Diego, California. (R at 2.) Under Bankruptcy Rule 7004(f), personal jurisdiction in this case is established by service:

> (f) Personal jurisdiction
>
> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R. Civ. P. made

> applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the [Bankruptcy] Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Appellants do not maintain that they were not served with process. Furthermore, they have participated in the bankruptcy case and related proceedings for more than ten years. Any personal jurisdiction argument they may have once had has been waived. *See United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Their personal jurisdiction argument is therefore also unavailing.

To the extent Appellants argue that Bankruptcy Court orders are void because they were obtained by fraud, their allegations do not meet the particularity requirements of Rule 9(b).[5]

Assuming the truth of Appellants' allegation that the Bankruptcy Judge did not take the oath of office (*cf.* R at 2360), this fact does not void Bankruptcy Court orders. *See Vaccari v. Maxwell,* 28 F. Cas. 862, 865 (C.C. N.Y. 1855) (oath of office is not a prerequisite for rightful authorization where the official is in possession of a place which has the character of a public office); *People ex rel. Barrett v. Finnegan,* 378 Ill. 387, 38 N.E.2d 715, 722 (Ill. 1941) (same).

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5. Rule 9(b) is made applicable to bankruptcy proceedings by Bankruptcy Rule 7009.

Third, Appellants maintain that the Trustee failed to make a candid disclosure to the Bankruptcy Court regarding the order pertaining to the Pier Block Properties and Mikal, Inc. (Ogden and Guiffre stock purchase notes). The alleged incomplete disclosures pertaining to Mikal, Inc. have already been addressed in *Keenan et al. v. Mikal, Inc.*, U.S. Dist. Ct. S.D. Cal., case no. 99cv2339-TW and *Keenan et al. v. Pyle et al.*, U.S. Dist. Ct. S.D. Cal., case no. 99cv1993-BTM (LSP), (*see* R at 1351, 1386), where the District Court found against Appellants. This court therefore declines to revisit the same issue. With respect to Pier Block Properties, Appellants allege that the Trustee intentionally falsely represented to the court he did not have the trust and purchase agreements documenting ownership interests in the property and that there was a dispute as to those interests, justifying the sale of Appellants' interest for a sum lower than deemed appropriate by Appellants. (Appellants' Brief at 6.) However, neither in the Complaint nor in their brief Appellants in any way identify the order which was allegedly issued based on Appellees' failure to candidly disclose the ownership interests.

Appellants also offer to amend their complaint to assert other incomplete disclosures. (*Id.* at 7.) However, Appellants did not make this representation in the Bankruptcy Court, nor do they offer any specifics as to the alleged nondisclosures. Considering that the alleged and proposed alleged incomplete disclosures pertain to bankruptcy proceedings in which Appellants were involved and documents with which Appellants were

familiar, there is no reason why Appellants could not have raised the issue in the proceeding in which the pertinent order was issued or enumerated all the alleged instances of nondisclosures in their initial complaint together with the pertinent order. Even if the Bankruptcy Court had been able to consider Appellants' belated suggestion that they could amend the complaint, denial of leave to amend would be justified based on undue delay and prejudice to the opposing party. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1527 (9th Cir. 1995); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996). This adversary action is the last thing delaying the closure of this almost twelve-year old case. (*See* R at 2354.)

Appellants argue the Bankruptcy Court erred by denying them leave to amend because "it was never established that leave to amend would be futile." (Appellant's Brief at 19.) This is not the case. The Bankruptcy Court concluded that the immunity doctrines precluded any basis for leave to amend. (R at 2361.) Appellants present no argument and cite no authority to suggest that this conclusion was an abuse of discretion. When the claims would be barred under any internally consistent set of facts, it would be futile to amend. *Swartz v. KPMG LLP*, 476 F.3d 756, 761 (9th Cir.2007); *see also Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir.1988) (if "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency, then . . . dismissal without leave to amend is proper."). Accordingly, the Bankruptcy Court order dismissing Appellants' complaint without leave to amend is affirmed.

Appendix B

The court next turns to the anti-SLAPP motion to strike under California Code of Civil Procedure Section 425.16, which provides in pertinent part,

> (b) (1) A cause of action against a person arising from any act of that person in herance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

The court therefore engages in a two-part inquiry:

> First, a defendant must make an initial prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech. . . . [¶] Second, once the defendant has made a prima facie showing, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the challenged claims. If the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim," the motion to strike must be denied.

Vess, 317 F.3d at 1110 (internal quotation marks and citations omitted).

Appendix B

Appellants argue that none of their claims fall within the protection of the statute. For purposes of the statute,

> "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law; [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law; . . . .

Cal.Code Civ. Proc. § 425.16(e). Other than summarizing the allegations of their pendent state law claims, Appellants offer no argument or legal authority to counter the Bankruptcy Court's finding that they arose out of Appellees' acts in furtherance of their right to petition the Bankruptcy Court. Based on Appellants' own admission (*see* R at 11), it is apparent that pendent state law claims arose from the Trustee's actions in his position as Bankruptcy Trustee in administering the estate. The pendent state law claims therefore arose from the Trustee's acts in furtherance of his right to petition the Bankruptcy Court.

Appellants do not specifically argue that they demonstrated in the Bankruptcy Court the probability of prevailing on the pendent state law claims. (*See* Appellant's Brief at 14-19.) Where the lower court

dismisses the underling complaint with prejudice and the dismissal is affirmed, a finding that the plaintiff established probability of success is precluded. *Vess*, 317 F.3d at 1110. The Bankruptcy Court's grant of the anti-SLAPP motion to strike is therefore affirmed.

For the foregoing reasons, the judgment of the Bankruptcy Court is **AFFIRMED.**

IT IS SO ORDERED.

DATED: March 28, 2008

s/ M. James Lorenz
M. James Lorenz
United States District Court Judge

APPENDIX C — ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT WITHOUT LEAVE TO AMEND OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED FEBRUARY 1, 2007

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 96-00871-B11

Adv. Proceeding No. 06-90341-B11

Chapter 11

In re:

JAMES W. KEENAN and JUDY M. KEENAN,

Debtors

JAMES W. KEENAN and JUDY M. KEENAN,

Plaintiffs,

v.

ROSS M. PYLE; PROCOPIO, CORY, HARGREAVES & SAVITCH, a business entity for unknown, JEFFREY ISAACS, an individual, and DOES 1-50, inclusive,

Defendants.

Appendix C

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT WITHOUT LEAVE TO AMEND

The motion of Defendants Ross M. Pyle (the "Trustee"), and Defendants Procopio, Cory, Hargreaves & Savitch and Jeffrey Isaacs (collectively the "Trustee's Counsel") (the Trustee and the Trustee's Counsel collectively "Defendants"), to dismiss the complaint of Plaintiff James W. Keenan and Judy M. Keenan (collectively the "Plaintiffs") or, alternatively, summary judgment/summary adjudication (the "Motion") came on regularly for hearing on January 26, 2007 in Department 4 of the above-entitled Court, the Honorable Peter W. Bowie, bankruptcy judge presiding. Defendants appeared through counsel Butz, Dunn, DeSantis & Bingham by Douglas M. Butz. Plaintiffs appeared through counsel Suppa Trucchi & Henein by Samy Henein.

This Court, having considered the papers filed by Defendants in support of the Motion, having heard argument of counsel, having stated the reasons for its decision as hereinbelow set forth on the record in open Court, which reasons are incorporated herein as findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, being fully advised in the premises and good cause appearing therefor,

Appendix C

IT IS HEREBY ORDERED as follows:

1. The Motion is granted.

2. Plaintiffs' Compaint filed June 30, 2006, is dismissed in its entirety with prejudice as to each and every claim for relief stated therein and as to each and every Defendant.

3. Judgment shall be entered in accordance with this order pursuant to which Defendants shall be entitled to have and recover against Plaintiffs and each of them, their costs of suit pursuant to Rule 7054 of the Federal Rules of Bankruptcy Procedure.

DATED: February 9, 2007

s/ [illegible]
Judge, United States Bankruptcy Court

Signature by the attorney constitutes a certification under Fed.R.Bankr.P. 9011 that the relief provided by the order is the relief granted by the Court.

Presented by:

BUTZ, DUNN, DESANTIS & BINGHAM

By: s/ Douglas M. Butz
Douglas M. Butz, Attorneys for Defendants
Ross M. Pyle, Procopio, Cory, Hargreaves
& Savitch LLP and Jeffrey Isaacs

APPENDIX D — JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED FEBRUARY 1, 2007

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 96-00871-B11

Adv. Proceeding No. 06-90341-B11

Chapter 11

In re:

JAMES W. KEENAN and JUDY M. KEENAN,

Debtors

JAMES W. KEENAN and JUDY M. KEENAN,

Plaintiffs,

v.

ROSS M. PYLE; PROCOPIO, CORY, HARGREAVES & SAVITCH, a business entity for unknown, JEFFREY ISAACS, an individual, and DOES 1-50, inclusive,

Defendants.

Appendix D

JUDGMENT

The Court, having entered (1) its order granting the motion of Defendants Ross M. Pyle, Procopio, Cory, Hargreaves & Savitch and Jeffrey Isaacs (collectively "Defendants") to dismiss Plaintiffs James W. Keenan and Judy M. Keenan's (collectively "Plaintiffs") complaint without leave to amend under Rule 12(b)(6) of the Federal Rules of Civil Procedure made applicable to bankruptcy adversary proceedings pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure, and (2) its order granting Defendants' anti-SLAPP motion to strike pendent state law claims in Plaintiffs' Complaint, being fully advised in the premises and good cause appearing therefor,

IT IS ORDERED AND ADJUDGED as follows:

1. The above-entitled action is hereby dismissed in its entirety with prejudice as to each and every claim for relief stated therein and as to each and every Defendant.

2. Defendants shall have and recover from Plaintiffs, and each of them, Defendants' costs of suit pursuant to Rule 7054 of the Federal Rules of Bankruptcy Procedure.

DATED: February 9, 2007

s/ [illegible]
Judge, United States Bankruptcy Court

Appendix D

Signature by the attorney constitutes a certification under Fed.R.Bankr.P. 9011 that the relief provided by the order is the relief granted by the Court.

Presented by:

BUTZ, DUNN, DESANTIS & BINGHAM

By: s/ Douglas M. Butz
Douglas M. Butz, Attorneys for Defendants
Ross M. Pyle, Procopio, Cory, Hargreaves
& Savitch LLP and Jeffrey Isaacs

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No. 09-545

Supreme Court, U.S.
FILED
DEC 4 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAMES KEENAN and JUDY KEENAN,

Petitioners,

v.

ROSS PYLE, JEFFREY ISAACS and PROCOPIO, CORY, HARGREAVES & SAVITCH LLP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATUTES AND RULES

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Respondents Ross M. Pyle ("Trustee"), liquidating trustee for the reorganized bankruptcy estate of James W. Keenan dba Data Property Services ("Estate") and Procopio, Cory, Hargreaves & Savitch LLP and Jeffrey Isaacs (collectively "Trustee's Counsel") (Trustee and Trustee's Counsel are collectively "Respondents") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by Petitioners James W. Keenan ("Debtor"), the debtor in the underlying bankruptcy case, and his wife Judy Keenan (collectively "Petitioners").

INTRODUCTION

Petitioners have presented no "compelling reasons" to grant their Petition. *See* Sup. Ct. R. 10. More specifically, contrary to the Petitioners' argument, the Petitioners' first question presented does not involve an intra-circuit (or any other) conflict; and the Petitioners' second, third and fourth questions presented do not involve issues decided by the Court of Appeals in its Memorandum disposition. On an even more fundamental level, Petitioners have forfeited their right to further appellate review. Petitioners should not be allowed to present questions to this Court when, in the trial court, Petitioners failed to file any response to the Respondents' motion to dismiss the Petitioners' complaint that resulted in the Judgment that preceded the Court of Appeals' Memorandum.

The appeal underlying the Petition is from a Judgment in an adversary proceeding associated with the Debtor's almost 14-year-old Chapter 11 bankruptcy case. Following confirmation of an unopposed liquidating plan of confirmation, all unsecured creditors were paid in late 2000 and the last of the secured creditors was paid in late 2001. However, the Estate has remained open solely for the purposes of either defending the claims Petitioners brought against Respondents or defending the more than 60 (unsuccessful) appellate proceedings prosecuted by Petitioners following Bankruptcy Court orders obtained by the Trustee.

In the underlying adversary proceeding, Petitioners sued the Trustee and Trustee's Counsel (i.e., Respondents) based on actions they allegedly took or did not take in their capacities as a court-appointed trustee and his court-approved counsel. The trial court granted the Respondents' *unopposed* motion to dismiss the complaint and entered Judgment in favor of Respondents. In their Petition, Petitioners raise no issues as to Trustee's Counsel, arguing only that the Court of Appeals erred in affirming the dismissal of the complaint against the Trustee.

At all times after his initial appointment as a Chapter 11 trustee in 1996 and his later appointment as liquidating trustee in 1998, the Trustee sought and obtained appropriate orders and judgments from the Bankruptcy Court authorizing every material action he has taken in his administration of the Estate. Each of those orders and rulings was obtained after

due notice to all interested parties, including Petitioners. Moreover, over the years, Petitioners or entities they controlled have filed three civil lawsuits against Respondents in which Petitioners raised every issue they raised in the underlying adversary proceeding. In short, here Petitioners did nothing more than repackage their previously-litigated claims.

Accordingly, because Petitioners have not met their burden of demonstrating any compelling reasons for the grant of a writ of certiorari, the Petition should be denied.

STATEMENT OF THE CASE

A. The parties

The Debtor is the out-of-possession debtor of a reorganized bankruptcy estate following his 1996 filing of a voluntary Chapter 11 bankruptcy case and the 1998 confirmation of a joint liquidating plan of reorganization ("Plan"). Dkt. 18, pp. 1501-02.[1] Petitioner Judy Keenan is the Debtor's wife. Dkt. 17, p. 1465. Together, Petitioners are the plaintiffs in the

[1] A citation to "Dkt." is to the District Court's docket. District Court docket entries 16-20 and 22 contain the complete 2,515-page record on appeal from the Bankruptcy Court, which was available to the Court of Appeals.

adversary proceeding underlying this appeal. ER 89-103.[2]

The Trustee was originally the Chapter 11 trustee for the Estate; and since confirmation of the Plan in 1998, he has been the duly appointed liquidating trustee of the Estate. Dkt. 18, p. 1502. The Trustee and Trustees' Counsel (Respondents) are the defendants in the adversary proceeding underlying this appeal. ER 89-103.

B. The Petitioners' adversary proceeding

In the bankruptcy case, the Trustee requested and obtained a series of orders providing a procedure to close the (now almost 14-year-old) case. In particular, based on the Debtor's objections to the Trustee's proposed procedure, the Bankruptcy Court (1) required the Trustee to produce for the Debtor's inspection every piece of non-privileged paper in the Trustee's actual or constructive possession pursuant to a detailed regulated schedule, and (2) thereafter established a one-year limitation period for the commencement of any actions or claims against the Trustee or Trustee's Counsel. Dkt. 17, pp. 1467-80; SER 8.[3] The Trustee fully complied with the ordered procedure. Dkt. 18, pp. 1516-21. Petitioners failed to

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[2] A citation to "ER" is to the Excerpts of Record filed in the Court of Appeals.

[3] A citation to "SER" is to the Supplemental Excerpts of Record filed in the Court of Appeals.

review *any* of the tens of thousands of pages of documents that were produced over a period of many months according to the court-ordered schedule. SER 4.

Petitioners initiated their adversary proceeding against Respondents by filing their complaint within days of the court-ordered bar date. ER 89-103.

C. The Trustee's authorization and Bankruptcy Court approvals

The Plan, by which the Trustee became a liquidating trustee, sets forth, *inter alia*, the Trustee's powers and duties. Dkt. 16, pp. 147-48. Pursuant to this authorization, the Trustee has been diligent in obtaining an appropriate order from the Bankruptcy Court approving *every* material action he has taken in his administration of the Estate. Each order found, either expressly or impliedly, that the Trustee's action was both authorized and in the best interests of the Estate. A list of the 167 orders and judgments, grouped together by subject matter based on the Petitioners' allegations in the underlying complaint, was presented to the trial court and is at pages 30-45 of the SER. The material allegations in the Petitioners' complaint are covered by these orders and judgments.

D. The Petitioners' prior unsuccessful collateral attacks

Despite the Plan's authorization and the Bankruptcy Court's express approval of the Trustee's actions, Petitioners have collaterally attacked these prior orders on (at least) two different fronts. Asserting professional improprieties, (1) the Debtor unsuccessfully attempted to compel the return of the Estate to him on four separate occasions[4] (Dkt. 17, pp. 884-1056, 1103-04), and (2) Petitioners filed and unsuccessfully prosecuted to judgment, affirmed on appeal, three civil lawsuits against Respondents (Dkt. 17, pp. 1289-1331, 1367-99). Many of the material allegations in the Petitioners' complaint are also covered by final orders and judgments in these collateral attacks.

E. The Petitioners' unsuccessful appeals of orders and judgments

The orders and judgments described above at parts B-D are only the beginning. Having lost at virtually every juncture in the trial court, Petitioners then engaged in an appellate blitz of these losses. Of the proceedings in which the Trustee has been involved directly, at the time this matter was heard in the Bankruptcy Court there had been at least 54

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[4] Petitioners allege the Estate is "presently worth an estimated $100,000,000." Pet., p. 2. Petitioners are wrong. There is no evidence of this alleged value, and Petitioners have provided no record reference for their gross exaggeration.

separate appellate court proceedings – including 38 to the District Court, 14 to the Ninth Circuit, and two to the state Court of Appeal.[5] *All* have been resolved adversely to Petitioners. SER 19, n. 2; *see also* Dkt. 3.

F. The proceedings before the Petition

In response to the complaint in the adversary proceeding below, as relevant here, Respondents filed a motion to dismiss, or alternatively to grant summary judgment or summary adjudication. Dkt. 16-18, pp. 30-1601. Respondents based their motion on seven distinct grounds: (1) Petitioners failed to comply with the "*Barton* doctrine";[6] (2) quasi-judicial immunity barred all claims; (3) derived judicial immunity barred all claims; (4) the doctrines of res judicata and/or collateral estoppel barred all claims; (5) the applicable statutes of limitations barred all claims; (6) the Trustee did not breach any duty to Petitioners; and (7) Petitioners were not entitled to declaratory relief. Dkt. 16, pp. 30-84.

Despite their participation in ongoing activities in both the adversary proceeding and the bankruptcy case, Petitioners failed to file any response to the

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[5] The total is now 62 separate appellate proceedings: the present Petition in this Court, 43 in the District Court, 16 in the Ninth Circuit, and two in the state Court of Appeal.

[6] No lawsuit may be maintained against a trustee for actions taken in the administration of the estate without leave of the appointing court. *Barton v. Barbour*, 104 U.S. 126, 127-29 (1881).

Respondents' motion. Rather, as recited by the District Court in this appeal, "[o]n the opposition due date, Debtor . . . filed an action against the Bankruptcy Judge in the District Court, alleging the [then 10-year-old] case should be transferred to another judge due to his bias." Pet., p. 8a, n. 3.

The Bankruptcy Court heard and orally granted the motion to dismiss the adversary proceeding. ER 48-72. Noting that "the motion is unopposed at this point", the Bankruptcy Court also reached the merits, denying the motion based on the "*Barton* doctrine" and granting the motion on all of the other six grounds raised. ER 57, 60-65. The court entered a written order, incorporating its oral rulings, and a Judgment of dismissal in favor of Respondents. Pet., Apps. C & D.

Petitioners appealed from the Judgment. Following briefing, the District Court filed a Memorandum Decision and a Judgment, affirming the Bankruptcy Court's Judgment in favor of Respondents. Pet., App. B; ER 4. More specifically, the District Court not only agreed that the lack of an opposition was a sufficient basis on which to affirm, but also agreed with the other six independent grounds given by the Bankruptcy Court for dismissing the case. Pet., App. B.

Petitioners then appealed to the Court of Appeals. Following briefing, the Ninth Circuit – Senior Circuit Judges Wallace and Leavy and Circuit Judge Hawkins – affirmed in a Memorandum, ruling in relevant part that quasi-judicial immunity barred all

of the Petitioners' claims against the Trustee.[7] Pet., App. A, *citing Curry v. Castillo (In re Castillo)*, 297 F.3d 940 (9th Cir. 2002); *Swartz v. KPMG LLP*, 476 F.3d 756, 761 (9th Cir. 2007) (per curiam).

REASONS FOR DENYING THE PETITION

I. Petitioners have forfeited their right to seek review in this Court

Petitioners did not file an opposition to the Respondents' motion to dismiss the Petitioners' complaint in the trial court. ER 57. Accordingly, Petitioners have forfeited the right to seek appellate review of the dismissal of their complaint. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1061, n. 13 (9th Cir. 2002); *Ratanasen v. California Dep't of Health Servs.*, 11 F.3d 1467, 1473 (9th Cir. 1993) (bankruptcy appeal).

This rule of forfeiture is not intended to be punitive. Rather, it serves (at least) two important purposes: (1) "sound considerations of judicial economy" (*Thomas v. Arn*, 474 U.S. 140, 147 (1985)); and (2) "prevent[ing] a litigant from 'sandbagging' the [trial] judge by failing to object and then appealing" (*Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1175

[7] As grounds for affirmance, Respondents briefed and argued all seven bases raised in their original motion to dismiss, although the Ninth Circuit only discussed, and affirmed based on, the Trustee's quasi-judicial immunity.

(9th Cir. 1996)). Both of these concerns are present here: Rather than file written opposition to the motions, thereby advising the Bankruptcy Court of any opposition to the motion, Petitioners instead (1) filed a civil lawsuit against the bankruptcy judge in the District Court, and (2) moved to disqualify the bankruptcy judge who had been presiding over the Debtor's bankruptcy case for more than 10 years in the Bankruptcy Court. *See Keenan v. Pyle (In re Keenan)*, 372 B.R. 496, 498, 500 (Bankr. S.D. Cal. 2007). Petitioners should not be allowed to come to this Court and now raise issues and arguments they intentionally avoided submitting to the trial court.

Moreover, in their 13,845-word opening brief in the Court of Appeals, Petitioners did not mention, let alone argue against, the application of quasi-judicial immunity – an issue that was (1) the Respondents' principal argument in the Bankruptcy Court and District Court, and (2) the principal ruling by both the Bankruptcy Court and District Court. *See* ER 61-62 (Bankruptcy Court's ruling); Pet., 9a (District Court referencing Bankruptcy Court's ruling), 14a-16a (District Court's ruling). Indeed, a review of their opening brief in the Court of Appeals establishes that Petitioners questioned only the application of *derived* judicial immunity, not *quasi*-judicial immunity, even though the two doctrines were treated separately by Respondents in their motion to dismiss (Dkt. 16, pp. 53-55, 55-58), by the Bankruptcy Court in its ruling granting the dismissal (ER 61-62, 62), by Respondents in their appellate brief in the District Court,

and by the District Court in its ruling affirming the Bankruptcy Court (Pet., pp. 14a-16a, 16a-19a).[8] Stated differently, in their Petition under consideration here, for the first time ever Petitioners have questioned the application of quasi-judicial immunity to preclude the claims in their complaint against the Trustee. This omission alone is a sufficient basis on which to deny the Petition, since this Court understandably wants "the benefit of developed arguments on both sides . . . squarely addressing the question" before granting certiorari. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992).

II. The Ninth Circuit's Memorandum does not conflict with any other decision

Supreme Court Rule 10(a) suggests that one of the "compelling reasons" for granting certiorari is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The Memorandum here, however, does not conflict with the decision of any other Court of Appeals, and Petitioners do not argue otherwise. Indeed, Petitioners do not even argue that the Memorandum conflicts with other Ninth Circuit authority. Petitioners argue *only* that two earlier opinions of the

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[8] The Petitioners' argument at the bottom of page 14 of their Petition demonstrates their continued confusion between quasi-judicial immunity and derived judicial immunity.

Ninth Circuit, one from 1983 and one from 2002, appear to be in conflict. Pet., p. 6 ("Thus, the *Cochise* and *Castillo* opinions are in conflict."), *comparing Curry v. Castillo (In re Castillo)*, 297 F.3d 940 (9th Cir. 2002) *with Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339 (9th Cir. 1983) (superseded by statute on other grounds as stated in *In re Palace Quality Servs. Indus.*, 283 B.R. 868, 894 (Bankr. E.D. Mich. 2002)).[9]

Contrary to Petitioners' arguments, however, the Ninth Circuit's *Castillo* and *Cochise College Park* opinions are consistent: A claim may be asserted against a bankruptcy trustee only for a breach of an affirmative duty, not for errors in judgment associated with the trustee's discretionary acts. *Castillo, supra,* 297 F.3d at 947; *Cochise College Park, supra,* 703 F.2d at 1357.[10]

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[9] In their opening brief in the Ninth Circuit, Petitioners did not mention the *Castillo* opinion, and Petitioners cited the *Cochise College Park* opinion only once – and that citation was in an argument not dealing with quasi-judicial immunity. This is despite *Castillo*'s prominence in the Respondents' briefs in the Bankruptcy Court, the District Court and the Court of Appeals, as well as in the rulings by the Bankruptcy Court and the District Court. ER 62; Pet., pp. 14a-16a.

[10] Even assuming (unjustifiably) a conflict between *Castillo* and *Cochise College Park*, the conflict is, at best, an intra-circuit conflict, which is best left to the Ninth Circuit to resolve. Significantly, Petitioners never argued to the Ninth Circuit, either in their merits brief or in a petition for rehearing or rehearing en banc, that *Castillo* and *Cochise* were inconsistent.

Acts performed by judges that relate to the "judicial process" are granted a "sweeping form of immunity." *Forrester v. White*, 484 U.S. 219, 225 (1988). The purposes of judicial immunity are to protect the finality of judgments by discouraging inappropriate collateral attacks and to assure judicial independence by insulating judges from what would otherwise be "vexatious actions prosecuted by disgruntled litigants." *Id.* Even bad faith or malice by a judge while performing judicial duties cannot overcome judicial immunity (*Mireles v. Waco*, 502 U.S. 9, 11 (1991)); and it applies "'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff'" (*Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985)).

As applicable here, the doctrine of "quasi-judicial immunity" extends judicial immunity to nonjudicial officers who are performing official duties functionally comparable to those of judges — i.e., duties that involve the exercise of discretion in resolving disputes. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993). Thus, those who perform activities closely related to the judicial process also are immune so that they can make quasi-judicial discretionary judgments free from the potential harassment of private litigation. *Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976). This immunity is based on "'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (prosecutor), *quoting from*

Forrester v. White, supra, 484 U.S. at 229 (state court judge).

As an officer of the court, a bankruptcy trustee performs both administrative and adjudicative functions, with quasi-judicial immunity attaching to "those functions essential to the authoritative adjudication of private rights to the bankruptcy estate." *Castillo, supra*, 297 F.3d at 950-51. Focusing on the "ultimate act," the Ninth Circuit commented that even purely administrative and routine acts requiring no adjudicatory skill are considered part of the judicial function when the activity is discretionary in nature. *Id.* at 952.

In *Castillo*, the Ninth Circuit held that quasi-judicial immunity precluded the debtor's claims against the trustee where the claims were based on the trustee's alleged mishandling of the discretionary acts of scheduling and notification of a plan confirmation hearing. 297 F.3d at 953. Because quasi-judicial immunity attached to the acts in question, the *Castillo* panel expressly declined to "reach [the debtor's] argument that bankruptcy trustees may be liable for negligence." *Id., citing Cochise College Park*, 703 F.2d 1339.

Castillo and *Cochise College Park* are not inconsistent or in conflict: Claims for negligence – even if allowed against trustees – are barred where the claim is based on a discretionary activity, because quasi-judicial immunity applies. In *Cochise College Park*, the Ninth Circuit was not faced with claims that the

bankruptcy trustee had mishandled discretionary judicial acts; the claims involved there alleged breaches of affirmative duties. Indeed, *Cochise College Park* is entirely consistent with *Castillo*: "[A] trustee is not liable in any manner for mistakes in judgment where discretion is allowed." *Cochise College Park, supra*, 703 F.2d at 1357, *citing Mosser v. Darrow*, 341 U.S. 267, 273-74 (1951).

In *Cochise College Park*, after executory contacts had been rejected, the trustee continued to demand, collect and spend the obligors' payments to the estate under the terms of the rejected contracts. 703 F.2d at 1345-46. Those who had made such payments later sued, alleging that the trustee had illegally retained possession of cash payments that were not property of the bankruptcy estate. *Id.* at 1346. Since "the trustee could not reasonably have believed that he was entitled to use the payments in the administration of the estate" (*id.* at 1356), the trustee's acts could not be considered discretionary judicial functions functionally comparable to those of judges (*id.* at 1357).[11] More specifically, once the contracts were rejected, the trustee had an affirmative duty to advise those making payments that the estate was no longer entitled to receive payments under the rejected

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[11] In contrast, to the extent the trustee retained payments received *before* the executory contracts were rejected, the receipt of those funds involved the trustee's discretionary functions related to whether the contracts would be accepted or rejected. 703 F.2d at 1354, 1358. Thus, arguably, claims related to those payments would have been subject to quasi-judicial immunity.

contracts. *Id.* at 1358. Thus, a breach of the trustee's affirmative duties (as opposed to an improper exercise of discretion) "gives rise to a claim for damages for which the trustee is personally liable." *Id.*

The claims in the present case are like those in *Castillo*, not *Cochise College Park*, since the Trustee's acts that form the bases of the Petitioners' complaint here were all discretionary. As the trial court expressly found: "[E]ach of the claims that has been asserted by [Petitioners] against the Trustee . . . arise from the performance of discretionary tasks, resolving disputes, liquidating assets, adjudicating private rights as against the bankruptcy Estate[.]" ER 61. Thus, here, as in *Castillo*, quasi-judicial immunity precludes the Petitioners' claims – even those alleging negligence.

Because the alleged conflict between *Castillo* and *Cochise College Park* asserted by Petitioners is illusory and of their own making, it does not present a compelling reason for granting certiorari.

III. The Petitioners' remaining arguments do not present a basis on which to grant certiorari

The Petitioners' remaining arguments, to the extent Respondents understand them, appear to be based on the statement that "the Ninth Circuit has effectively sanctioned egregious conduct by a court[-]appointed trustee and its attorneys." Pet., p. 8;

see generally id., pp. 8-16. None of what Petitioners present provides a basis on which to grant certiorari.

Petitioners first complain about an allegedly "intolerable situation" related to the closing of the bankruptcy case.[12] Pet., p. 8. In this regard, however, what Petitioners failed to tell this Court is that the only events keeping the case open have been initiated by Petitioners. The last unsecured claim was paid in late 2000, the last secured claim was paid in late 2001, and the Trustee first commenced efforts to close the case in 2002. The Debtor opposed the Trustee's original motion in 2002 for an order in aid of closure of the case; and the Bankruptcy Court agreed with the Debtor and denied the Trustee's motion. The Trustee filed a second motion for an order in aid of closure of the case in mid-2003, which the Bankruptcy Court granted despite opposition by the Debtor; and the Debtor unsuccessfully appealed that order. The Trustee then filed a motion for an order approving the procedures to close the case (as approved in mid-2003), which the Bankruptcy Court granted in part despite opposition by the Debtor; and the Debtor unsuccessfully appealed that order – twice. The Trustee complied with the year-long protocol attendant to closing the case, applying for

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[12] Petitioners make statements concerning dollar values of claims, assets, and fees and administrative expenses related to the Estate. Pet., pp. 8-9. Respondents strenuously disagree with the Petitioners' version of these facts – notably, facts Petitioners have presented without any record references.

and receiving Bankruptcy Court approval at various stages. *See generally* SER 43-44 & related exhibits 147-148, 150-153. The point is: What Petitioners complain of in their Petition all relate either to the confirmed plan of reorganization or to the procedures employed in attempting to close the case – i.e., final orders, most of which Petitioners opposed and from many of which Petitioners appealed.

Petitioners then quote at length from their complaint, ultimately contending that Respondents are "liable for failing to promptly administer the [E]state and pay creditors and for wrongfully refusing to promptly return the residual estate . . . [and] for mismanaging certain [E]state assets, for the diminution to the [E]state from their non-disclosure or concealment of documents, and for other negligent, grossly negligent and fraudulent conduct." Pet. pp. 13, 9-13. Because all of these allegations relate to discretionary acts, the claims associated with them are all barred by the doctrine of quasi-judicial immunity. *See* part II, *supra*. Moreover, as argued by Respondents in the Bankruptcy Court, in the District Court and in the Court of Appeals and as concluded by the Bankruptcy Court and by the District Court, such claims are also barred by the doctrines of derived judicial immunity, res judicata and/or collateral estoppel and the applicable statutes of limitations. ER 62-65 (Bankruptcy Court); Pet., pp. 16a-21a (District Court). Affirming based solely on quasi-judicial immunity, the Court of Appeals declined to reach these alternative issues and arguments in its

Memorandum. Pet., p. 2a. Without the benefit of the Court of Appeals' refinement and resolution of these issues, however, this Court should deny the Petition. *Austin v. United States*, 509 U.S. 602, 622-23 (1993) ("Prudence dictates that we allow the lower courts to consider that question in the first instance.").

CONCLUSION

Because Petitioners have not established any compelling reasons for granting a writ of certiorari, their Petition should be denied.

Respectfully submitted,

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